

TITLE 16. BOARD OF PODIATRIC MEDICINE

NOTICE IS HEREBY GIVEN that the Board of Podiatric Medicine (hereinafter "board") is proposing to take the action described in the Informative Digest. Any person interested may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held at the San Francisco Health Commission, 101 Grove Street, Room 300, San Francisco, California, at 9:00 AM, on May 16, 2003. Written comments, including those sent by mail, facsimile, or e-mail to the addresses listed under Mischa Matsunami in this Notice, must be received by the board at its office not later than 5:00 p.m. on May 14, 2002 or must be received by the board at the hearing. The board, upon its own motion or at the instance of any interested party, may thereafter adopt the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

Authority and Reference: Pursuant to the authority vested by Sections 803, 803.1 and 2470 of the Business and Professions Code and Section 6253 of the Government Code, and to implement, interpret or make specific Sections 803, 803.1, 2027, 2236.1, and 2470 of the Business and Professions Code, Sections 6250, 6253 and 11504 of the Government Code and Section 1798.24 of the Civil Code, the board is considering changes to Division 13.9 of Title 16 of the California Code of Regulations as follows:

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Business and Professions Code section 2470 authorizes the board to adopt, amend, or repeal, in accordance with the provisions of the Administrative Procedure Act, regulations which are necessary to enable the board to carry into effect the provisions of law relating to the practice of podiatric medicine.

1. Amend Section 1399.650. Citation:

Existing regulation refers to the body of Division 13.9 of Title 16 of the California Code of regulations as "This chapter."

This proposal would change this reference to “This division” to be consistent with the organization of these regulations.

2. Add Section 1399.700

This proposal would add to the Board’s regulations, a section which expresses the overall goal of the Board to permit maximum information access to consumers and members of the public consistent with statutory and constitutional law.

3. Add Section 1399.701

The addition of this section to the Board’s regulations was mandated by SB 1950 in 2002, and requires the Board to adopt regulations defining the status of a licensee by January 1, 2004. This designated status will be used either in response to public inquiries, or, in posting information on its website regarding doctors of podiatric medicine.

4. Add Section 1399.702:

The addition of this section to the Board’s regulations was mandated by SB 1950 in 2002, and requires the Board to “develop standard terminology that accurately describes [certain] types of disciplinary filings and actions.”

5. Amend Section 1399.700:

Existing regulation defines the types of information that the Board will disclose (if known) regarding any doctor of podiatric medicine licensed in California.

This proposal would renumber this section to be consistent with Article 9 regulations in accordance with the proposed additions contained in this notice.

This proposal would also make changes to the following subdivisions:

Subdivision (b) – Proposed changes are primarily for the purposes of clarification to fill in gaps in the types of disciplinary actions taken against a doctor of podiatric medicine that will be disclosed.

Subdivision (c) – Existing subdivision (c) requiring the disclosure of medical malpractice judgments in excess of \$30,000 was deleted because it has been replaced and expanded by new subdivision (d). Medical malpractice

judgments in any amount will now be reported regardless of whether reversed on appeal. This information will be accompanied by a disclaimer which states any judgment is subject to appeal and reversal by a higher court. The Board believes this expanded disclosure requirement is consistent with the policy of providing maximum amount of information permissible for purposes of consumer protection. The latter portion of old subdivision (b) was redesignated as subdivision (c).

Subdivision (d) – Old subdivision (d) was deleted because it is redundant with subdivision (b) as modified.

Subdivision (e) – New subdivision (e) regarding disclosure of arbitration awards is consistent with new language added to Section 803.1 by SB 1950.

Subdivision (f) - Old subdivision (e) was redesignated as subdivision (f).

Subdivision (g) – New subdivision (g) regarding disciplinary actions taken at a hospital or other type of health care facility is consistent with language in Business and Professions Code Section 2027. It requires postings on the internet of disciplinary actions taken at hospitals against physicians and surgeons resulting in a loss of staff privileges.

Subdivision (h) – New subdivision (h) adds a requirement regarding disclosure of referrals to the Attorney General for purposes of disciplinary action. It would permit the Board to disclose the referral of a matter to the Attorney General for the filing of a disciplinary action against a doctor of podiatric medicine.

6. Add Section 1399.704:

This section is consistent with the Board's overall policy of maximizing disclosure to the public, and will require the release of information concerning past or pending complaints against a doctor of podiatric medicine. These complaints will only be disclosed if they have resulted in a referral to the Attorney General or a formal legal action. Complaints found to be without merit or that result in no legal action being taken following a referral will be dropped from the Board's disclosure system. A disclaimer will accompany disclosure of complaints that have resulted in a referral. Finally, to protect the privacy rights of the complainant, information that would identify or lead to his or her identification will not be disclosed.

7. Add Section 1399.705:

The addition of this section to the Board's regulations was mandated by SB 1950 in 2002, which, in accordance with Section 803.1 of the Business and Professions Code, places restrictions on the types of information that can be disclosed with respect to settlement of civil cases involving professional

malpractice of physicians and surgeons and doctors of podiatric and osteopathic medicine.

8. Add Section 1399.706:

In accordance with Section 2027 of the Business and Professions Code and Section 1399.703 of these regulations, this regulation would describe parameters for the disclosure of information on the Board's website concerning licensed doctors of podiatric medicine.

9. Amend Section 1399.705:

This proposal would renumber this section to be consistent with the proposed changes and additions contained in the proposed language under Article 9.

FISCAL IMPACT ESTIMATES

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: none

Nondiscretionary Costs/Savings to Local Agencies: none

Local Mandate: none

Cost to Any Local Agency or School District for Which Government Code Section 17561 Requires Reimbursement: none

Business Impact:

The board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

AND

The following studies/relevant data were relied upon in making the above determination:

Aside from technical changes, this proposal contains amendments

pertaining to the extent to which the Board will disclose information about its licensees pursuant to Section 803.1 of the Business and Professions Code as amended by SB 1950 in 2002. It is not anticipated that an expanded information disclosure policy will have any adverse impact on California businesses, as the primary goal of this proposal is consistent with the Board's overall goal to permit maximum information access for consumers and members of the public consistent with statutory and constitutional law. In addition, these amendments will apply to all doctors of podiatric medicine licensed in California, and therefore, will not impose any significant adverse economic impact on individual businesses.

Impact on Jobs/New Businesses:

The board has determined that this regulatory proposal will not have a significant impact on the creation of jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the State of California.

Cost Impact on Representative Private Person or Business:

The board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Effect on Housing Costs: None

EFFECT ON SMALL BUSINESS

The board has determined that the proposed regulations would not affect small businesses. Substantive changes will affect the parameters of the Board's information disclosure policy, which applies to every licensed doctor of podiatric medicine practicing in the state of California.

CONSIDERATION OF ALTERNATIVES

The board must determine that no reasonable alternative which it considered or that has otherwise been identified and brought to its attention would either be more effective in carrying out the purpose for which the action is proposed or

would be as effective and less burdensome to affected private persons than the proposal described in this Notice.

Any interested person may present statements or arguments orally or in writing relevant to the above determinations at the above-mentioned hearing.

INITIAL STATEMENT OF REASONS AND INFORMATION

The board has prepared an initial statement of the reasons for the proposed action and has available all the information upon which the proposal is based.

TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations and of the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained at the hearing or prior to the hearing upon request from the Board of Podiatric Medicine at 1420 Howe Avenue #8, Sacramento, California 95825-3291.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the person named below.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact person named below, or by accessing the website listed below.

CONTACT PERSON

Inquiries or comments concerning the proposed administrative action may be addressed to:

Name: Mischa Matsunami
Address: 1420 Howe Avenue, Suite #8
Sacramento, CA 95825
Telephone No.: (916) 263-0315
Fax No.: (916) 263-2651
E-Mail Address: Mischa_Matsunami@dca.ca.gov

The backup contact person is:

Name: Jim Rathlesberger
Address: 1420 Howe Avenue, Suite #8
Sacramento, CA 95825
Telephone No.: (916) 263-2647
Fax No.: (916) 263-2651

Inquiries concerning the substance of the proposed regulations may be directed to Mischa Matsunami, (916) 263-0315.

Materials regarding this proposal can be found at:
<http://www.dca.ca.gov/bpm/about/pendregs.htm>.

BOARD OF PODIATRIC MEDICINE

PROPOSED LANGUAGE

Title 16, Division 13.9, California Code of Regulations

ARTICLE 1. GENERAL PROVISIONS

§ 1399.650. Citation

This ~~chapter~~ division may be cited and referred to as the “Podiatric Medicine Regulations.”

* * * *

ARTICLE 9. INFORMATION DISCLOSURE

§ 1399.700. Statement of Policy.

It is the policy of the Board of Podiatric Medicine to permit the maximum public access to information in its possession consistent with the requirements of the California Public Records Act (Govt. Code § 6250 et seq.), the Information Practices Act (Civ. Code § 1798 et seq.), Section 803.1 of the Business & Professions Code and the individual’s right of privacy guaranteed by the California Constitution (Art. I, § 1).

NOTE: Authority cited: Sections 803, 803.1 and 2470, Business and Professions Code; Section 6253 Government Code.
Reference: Sections 803 and 803.1, Business and Professions Code; Sections 6250 and 6253, Government Code.

§ 1399.701.

Status of Licensees.

The Board shall use the following categorical description when referring to licensed doctors of podiatric medicine either in response to public inquiries or in posting information on its website.

- (a) A licensed doctor of podiatric medicine is not considered to be in “good standing” if he or she:

 - 1) Is subject to an order issued by the Board or any other civil, criminal or administrative court or agency that limits or in any way restricts his or her practice.
 - 2) Has entered into a settlement with either the Board, any other administrative agency, the Attorney General, or any civil or criminal prosecutor which in any way limits or restricts his or her practice.
 - 3) Has been suspended following conviction of any crime referred to in Business and Professions Code Section 2237 or Penal Code Sections 187, 261, 262, or 288.
 - 4) Has been incarcerated following conviction of a felony.
- (b) Any licensed doctor of podiatric medicine who does not have a “good standing” designation may petition the Board to have this designation changed. The petition shall be heard before an administrative law judge designated in Section 11371 of the Government Code and pursuant to the provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code).

NOTE: Authority cited: Sections 803, 803.1 and 2470, Business and Professions Code; Section 6253, Government Code.
Reference: Sections 803, 803.1, 2027, 2236.1, Business and Professions Code; Section 11504, Government Code.

§ 1399.702. Standard Terminology Describing Different Types of Disciplinary Actions Listed in Subdivision (a) of Section 803.1 of the Business and Professions Code.

(a) Temporary Restraining Order

A temporary restraining order is a procedural device which State agencies can seek to prevent violations of the law or to suspend a license before formal disciplinary action is taken. It is also used to preserve the status quo or prevent the occurrence of irreparable injury pending further judicial or administrative proceedings. Such an order can only be issued by a court. Except in very severe emergency situations, the agency must give the licensee notice in order that he or she can be heard by the court.

(b) Interim Suspension Order

Interim suspension orders may be issued by administrative law judges following an application by the Board when it appears that continued practice by a doctor of podiatric medicine would endanger the public health, safety, or welfare. The doctor of podiatric medicine is entitled to advance notice of such proceedings unless there is a showing that serious injury will result to the public before a hearing can be held. If an interim suspension order is issued, an accusation must be filed by the Board, a hearing conducted, and a decision issued by the administrative law judge on a very accelerated time frame. If these deadlines are not met, the interim suspension order is dissolved by operation of law.

(c) Revocations, suspensions, probations, or limitations on practice ordered by the Board

These penalties may be imposed by the Board, but only after the doctor of podiatric medicine is notified of such proposed action and given an opportunity to be heard before an independent administrative law judge. The most severe penalty is revocation of the license to practice. Lesser penalties include a specified period of probation including the imposition of limitations on the manner or type of practice by the doctor of podiatric medicine.

(d) Public Letters of Reprimand

Public letters of reprimand or reproof may be issued by the Board for any act that would constitute grounds to suspend or revoke the license of a doctor of podiatric medicine. Letters of reprimand shall be purged from the file of the doctor of podiatric medicine five (5) years after they are issued.

(e) Infractions, citations or fines

A citation is issued by the Board for violations of specified provisions of law found in the Business and Professions Code. The citation may contain an order to stop performing some activity (order of abatement) and/or levy a fine. Any doctor of podiatric medicine served with a citation has a right to a hearing before an independent administrative law judge.

NOTE: Authority cited: Section 803.1 Business and Professions Code.
Reference: Section 803.1, Business and Professions Code.

§ 1399.7003. Requirements for Information Disclosure.

The Board of Podiatric Medicine will disclose the following information, if known, upon any request regarding any doctor of podiatric medicine licensed in California:

(a) Current status of a license, issuance and expiration date of a license, podiatric medical school of graduation, and date of graduation.

(b) Any public action or administrative decision against any doctor of podiatric medicine, and any disposition thereof, taken by the Board, another state or the Federal Government including, but not limited to:

1) the filing of an accusations, decisions,

- 2) licensure revocations;
- 3) denial of an application for licensure;
- 4) temporary restraining orders;
- 5) interim suspension orders;
- 6) citations, infractions, or fines imposed;
- 7) limitations on practice ordered by the board including those made part of a probationary order or stipulated agreement; and
- 8) public letters of reprimand.

The following disclaimer shall be included with these disclosures:

“Any adverse judgment or administrative order is subject to appeal or challenge by the doctor of podiatric medicine. For example, if an order revoking the license of a doctor of podiatric medicine is adopted by the Board, he or she can challenge that order by filing a petition for a writ of mandamus in superior court. If this court determines the order was issued contrary to law, it can vacate the Board’s action and order that the doctor of podiatric medicine be reinstated.”

(c) Accusations which have been filed and later withdrawn shall be retained in the board’s files for a period of one year after the accusation is withdrawn.

~~(c) Medical malpractice judgments in excess of \$30,000 reported to the board on or after January 1, 1993, including the amount of judgement, the date of the judgement, the court of jurisdiction, the case number, a brief summary of the circumstances as provided by the court, and an appropriate disclaimer including, but not limited to, the accuracy of the information provided.~~

~~(d) Discipline imposed by another state or the federal government reported to the Board on or after January 1, 1991, including the discipline imposed, the date of the discipline, the state where the discipline was imposed, and an appropriate disclaimer including, but not limited, to the accuracy of the information provided.~~

(d) Civil judgments in any amount of a claim or action for damages for death or personal injury caused by the negligence, error, or omission in practice by a doctor

of podiatric medicine, or by his or her rendering unauthorized professional services, whether or not vacated by a settlement after entry of the judgment and whether or not reversed on appeal, including the date and amount of judgment, the court and case number, a brief summary of the circumstances as provided by the court, plus any information the Board possesses pertaining to the disposition of the case following entry of judgment. The Board shall also include the following disclaimer with such disclosures:

“Any civil judgment is subject to appeal by the losing party. For example, if a judgment is entered against a doctor of podiatric medicine, he or she can appeal to a higher court. If this court determines the judgment was entered in error, it can either vacate it or reduce the amount of any money damages awarded against the podiatrist.”

(e) Arbitration awards in any amount of a claim or action for damages for death or personal injury caused by the negligence, error, or omission in practice of the doctor of podiatric medicine, or by his or her rendering unauthorized professional services.

(e)(f) California felony convictions reported to the board on or after January 1, 1991, including the nature of the conviction, the date of conviction, the sentence, if known, the court of jurisdiction, and an appropriate disclaimer including, but not limited to, the accuracy of the information provided.

(g) Summaries of any disciplinary actions taken at a hospital or any other type of health care facility that result in the termination or revocation of staff privileges of a doctor of podiatric medicine for medical disciplinary cause or reason.

(h) Matters that have been referred to the Attorney General for the filing of an accusation or statement of issues; provided that:

- 1) The matter has not been rejected by the Attorney General; and
- 2) The following disclaimer accompanies the disclosure:

“Referral of a matter to the Attorney General for the filing of an accusation or statement of issues only occurs after an investigation has

been conducted by the Board and a determination has been made that the actions of the podiatrist are of a nature that should warrant disciplinary action. In some instances, however, the Attorney General may determine that disciplinary action is not warranted. Such cases will normally not result in the filing of a formal accusation. When an accusation is filed, the podiatrist will be given notice and the right to request a hearing before an independent administrative law judge. At such a hearing the Board has the burden of proving the allegations contained in the allegation. Unless a legal determination is made that the Board has sustained this burden, no disciplinary action may be taken against the doctor of podiatric medicine.”

NOTE: Authority cited: Sections 803, 803.1 and 2470, Business and Professions Code; Section 6253, Government Code.
Reference: Sections 803 and 803.1, Business and Professions Code.

1399.704 **Disclosure of Complaints.**

The Board shall maintain records showing the complaints received against doctors of podiatric medicine and, with respect to such complaints, shall make available to inquiring members of the public the following information:

(a) The nature of all complaints on file which have been investigated by the Board and referred for legal action to the Attorney General, including:

- 1) The date of the complaint;
- 2) A brief summary of the nature of the complaint; and
- 3) Its disposition.

(b) Under no circumstances shall the name, identity, or information that might lead to the discovery of the identity of the complainant be disclosed.

(c) Information concerning the complaint shall be accompanied by the disclaimer set out in Section 1399.703(h)(2). If no action is taken by the Attorney General, records of the complaint shall be deleted from the Board’s complaint disclosure system no later than one year after receipt of the decision by the Attorney

General to take no action.

(d) If a complaint results in legal action and is subsequently determined by the Board, the Attorney General, or a court of competent jurisdiction not to have merit, it shall be deleted from the complaint disclosure system.

NOTE: Authority cited: Sections 803.1 and 2470, Business and Professions Code; Section 6253, Government Code.
Reference: Sections 803 and 803.1, Business and Professions Code;
Section 6250, Government Code; Section 1798.24, Civil Code.

1399.705 **Disclosure of Civil Settlements.**

Upon request, the Board will disclose information in its possession concerning settlement of civil actions seeking recovery of damages for death or personal injury caused by the professional negligence, errors, or omissions of a doctor of podiatric medicine or his or her unauthorized practice as described below.

(a) For settlements of \$30,000 or more entered into prior to January 1, 2003, the Board will disclose the following information:

- 1) The date and amount of the settlement;
- 2) The case number, court and parties to the civil action; and
- 3) The following disclaimer:

“Settlement of a claim may occur for a variety of reasons that do not necessarily reflect negatively on the professional competence or conduct of the doctor of podiatric medicine. A payment in settlement of a medical malpractice action or claim should not be construed as creating a presumption that medical malpractice in fact occurred.”

(b) For settlements entered into on or after January 1, 2003, the Board will disclose information pursuant to Business and Professions Code Section 803.1(b) & 803.1(c) and regulations promulgated by the Medical Board of California.

NOTE: Authority cited: Sections 803.1 and 2470, Business and Professions Code; Section 6253, Government Code.
Reference: Section 803.1, Business and Professions Code; Section .

1399.706 **Disclosure of Information Concerning Licensed Doctors of Podiatric Medicine on the Board's Website.**

For each licensed doctor of podiatric medicine, the Board will maintain on its website all of the information described in subdivision (a) of Section 1399.703 of these regulations as well as information on whether the doctor of podiatric medicine is in “good standing” as that term is used in Section 1399.701. If the doctor of podiatric medicine is not in good standing, the website shall indicate what restrictions, legal actions, orders, or discipline are currently pending.

NOTE: Authority cited: Sections 803, 803.1 and 2470, Business and Professions Code; Section 6253, Government Code.
Reference: Sections 803.1 and 2470, Business and Professions Code.

ARTICLE 10. CORRECTIVE SHOES

§1399.7057. **Sale of Corrective Shoes by Unlicensed Persons.**

**BOARD OF PODIATRIC MEDICINE
INFORMATION DISCLOSURE REGULATIONS
INITIAL STATEMENT OF REASONS**

Background

The Public Records Act (Govt. Code § 6250 et seq.) provides that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” This Act also provides that the public has a right to inspect public records unless they are exempted from mandatory disclosure by express provisions of law. (Govt. Code § 6253(b).)

In addition to the Public Records Act, Business and Professions Code Sections 803 and 803.1 mandate that the Board of Podiatric Medicine (“the Board”) either disclose or withhold certain categories of information pertaining to doctors of podiatric medicine. These sections were modified by SB 1950 in 2002. The new legislation also requires the Board to adopt regulations pertaining to the type of information it discloses.

Accordingly, the Board proposes to modify its existing regulations governing the disclosure of information pertaining to the professional status of doctors of podiatric medicine. In proposing these regulations, the goal of the Board is to provide maximum disclosure to the public consistent with governing statutory and constitutional law.

**Relationship of the Public Records Act and Business & Professions
Code Sections 803 and 803.1**

The Public Records Act requires state agencies to disclose public records in their possession unless specifically exempted. Exempted records *may*, but need not be disclosed. By contrast, Business and Professions Code Sections 803 and 803.1 identify categories of information concerning licensed health care professionals which must either be disclosed or withheld. Even though a particular item of information may not be covered by sections 803 or 803.1, the Board must still determine whether its disclosure is independently required by the Public

Records Act.

For example, Section 803.1 mandates the disclosure of malpractice judgments ***not reversed*** on appeal. The Board, however, may also be in possession of information or documents concerning judgments that ***were*** reversed. The reversal of the judgment does not suddenly make this information non-public. Therefore, disclosure would still be required under the Public Records Act.

Information pertaining to the professional status of doctors of podiatric medicine would normally be a matter of public nature and thus disclosure would be required under the Public Records Act. There are, however, exceptions. Matters of impacting the privacy rights of the licensed professional such as Social Security Numbers, home address and telephone numbers would not be disclosed to the public.

Using these statutory and constitutional principles, the Board proposes to adopt the following regulations which would govern information disclosures to the public.

Section 1399.650 - Manner of Citation.

The regulations of the Board are contained in Division 13.9 of Title 16 of the California Code of Regulations. Section 1399.650 currently refers to the body of these regulations as “This chapter.” To be consistent with the organization of the regulations, this reference has been changed to “This division.”

Section 1399.700 - Statement of Policy.

This new section expresses the overall goal of the Board to permit maximum information access for consumers and members of the public consistent with controlling statutory and constitutional law.

Section 1399.701 - Status of Licensees.

This new section was mandated by SB 1950. It requires the Board to adopt regulations defining the status of a licensee by January 1, 2004. It was drafted to include a licensee within the “good standing” category unless his or her practice is subject to some type of restriction or limitation as a result of a settlement, judicial or administrative order or because of a suspension following a conviction of certain crimes or an incarceration following conviction of a felony. In addition, if the doctor of podiatric medicine objects because of non-inclusion in the “good standing” category, he or she will have the right to challenge this designation at an administrative hearing.

Section 1399.702 - Standard Terminology Describing Different Types of Disciplinary Actions

This regulation is also mandated by SB 1950. It requires the Board to “develop standard terminology that accurately describes [certain] types of disciplinary filings and actions.” In formulating this terminology, the Board gave a basic explanation of each type of action, the procedures involved, and when each can be utilized.

Section 1399.703 - Requirements for Information Disclosure.

This proposed regulation is a modified version of existing Section 1399.700. The changes made in subdivision (b) are primarily for purposes of clarification to fill in gaps in the types of disciplinary actions taken against a doctor of podiatric medicine that will be disclosed.

Existing subdivision (c) requiring the disclosure of medical malpractice judgments in excess of \$30,000 was deleted because it has been replaced and expanded by new subdivision (d). Medical malpractice judgments in any amount will now be reported regardless of whether reversed on appeal. This information will be accompanied by a disclaimer which states any judgment is subject to appeal and reversal by a higher court. The Board believes this expanded disclosure

requirement is consistent with the policy of providing maximum amount of information permissible for purposes of consumer protection.

Old subdivision (d) was deleted because it is redundant with subdivision (b) as modified.

New subdivision (e) regarding disclosure of arbitration awards is consistent with new language added to Section 803.1 by SB 1950.

Old subdivision (e) was redesignated as subdivision (f).

New subdivision (g) regarding disciplinary actions taken at a hospital or other type of health care facility is consistent with language in Business and Professions Code Section 2027. It requires postings on the internet of disciplinary actions taken at hospitals against physicians and surgeons resulting in a loss of staff privileges.

1399.703(h) - Disclosure of Referrals to the Attorney General

Section 1399.703(h) adds a requirement regarding disclosure of referrals to the Attorney General for purposes of disciplinary action. It would permit the Board to disclose the referral of a matter to the Attorney General for the filing of a disciplinary action against a doctor of podiatric medicine. In the past, objections have been raised against disclosure of referrals to the Attorney General. They have centered on possible violation of the individual's privacy and due process rights. The Board believes these objections to be without merit for the following reasons.

1) Privacy

Information disclosed about a licensed professional normally does not concern his or her private life. Rather, it primarily relates to his or her professional competence and qualifications as a licensee of the State. Such information should not be shielded from public scrutiny, particularly on the ground that it impacts the individual's right to privacy.

In *Board of Medical Quality Assurance v. Andrews*, 211 Cal. App. 3d 1346, 1359, 260 Cal. Rptr. 113 (1989), the court observed that:

“The right of an individual to privacy does not encompass any right to diagnose or treat other individuals.”

Likewise, in *Cohen v. Marx*, 94 Cal. App. 2d 704, 705, 211 P.2d 320 (1949), the court noted that:

“A person who by his accomplishments, fame or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs, or character, is said to become a public personage, and thereby relinquishes a part of his right of privacy.”

Based on this authority, the Board does not believe that disclosure of referrals to the Attorney General for possible disciplinary action violates the right of privacy of any licensed doctor of podiatric medicine.

2) Procedural Due Process

Disclosure of a referral to the Attorney General’s office could affect the reputation interest of the licensed professional. It would not, however, directly impact his or her property interest. Nor would it constitute action by the State which would foreclose the ability of the individual to practice his or her profession. That could only occur after a license revocation following an administrative or judicial hearing.

Earlier U.S. Supreme Court cases such as *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), if read in a vacuum, might support the argument that mere damage to reputation triggers a due process interest. But the Supreme Court limited these apparent holdings in the seminal case of *Paul v. Davis*, 424 U.S. 693 (1976). It noted that:

“Two things appear from [this] line of cases The Court has recognized the serious damage that could be inflicted by branding a government employee as ‘disloyal’ and thereby stigmatizing his good name. But the Court has never held that the mere defamation of an individual whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment.” (p. 705.)

Rather, the Court noted it was the *altered legal status* accompanying the defamatory statements which justified the invocation of procedural safeguards. (p. 707. In *Constantineau*, it was the inability to transact business in local liquor stores.)

The Court then concluded that:

“In each of these cases [i.e. *Constantineau*, etc.] . . . a right or status previously recognized by state law was distinctly altered or extinguished. It was this alternation, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the ‘liberty’ or ‘property’ recognized in those decisions. . . . And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of and ‘liberty’ or ‘property’ recognized by state or federal law, nor has it worked any change of respondent’s status as theretofore recognized under the State’s laws. For these reasons we hold that the interest in reputation asserted in this case is neither ‘liberty’ nor ‘property’ guaranteed against state deprivation without due process of law.” (424 U.S. at 711 - 13.)

California state courts are in accord with their federal counterparts. In *Haight v. City of San Diego*, 228 Cal. App. 3d 413, 418, 278 Cal. Rptr. 334 (1991), the court noted that:

“It is well established ‘[a] person’s protected interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. . . . Rather, the liberty interest is infringed only when the defamation is made in connection with the loss of a government benefit, such as employment.’” (Quoting *Murden v. County of Sacramento*, 160 Cal. App. 3d 302, 308, 206 Cal. Rptr. 699 (1984).)

In addition, even if the damage to reputation adversely impacted the individual's business, this would still not be sufficient to trigger procedural due process rights. (*WMX Technologies, Inc. v. Miller*, 197 F.3d 367, 375 (9th Cir. 1999) (en banc).)

Based on this federal and state case authority, the Board has determined that even if disclosure of a referral adversely impacted the reputation of a doctor of podiatric medicine, this would not constitute a violation of his or her due process rights. In addition, to minimize these risks in the first instance, a disclaimer will be required to accompany such disclosures. It notes that the matter has only been referred following a completed investigation, that the doctor of podiatric medicine will have the right to defend himself or herself against any charges at a hearing before an independent administrative law judge. Finally, if a hearing is conducted, the Board has the ultimate burden of establishing the truth of these charges before any disciplinary action can be taken.

1399.704 - Disclosure of Complaints.

Consistent with the Board's overall policy of maximizing disclosure to the public, this Section will require release of information concerning past or pending complaints against a doctor of podiatric medicine. Again, only complaints will be disclosed if they have resulted in a referral to the Attorney General or a formal legal action. Complaints found to be without merit or that result in no legal action being taken following a referral will be dropped from the Board's disclosure system. A disclaimer will accompany disclosure of complaints that have resulted in a referral. Finally, to protect the privacy rights of the complainant, information that would identify or lead to his or her identification will not be disclosed.

1399.705 - Disclosure of Civil Settlements.

Business and Professions Code Section 803.1 as modified by SB 1950 places restrictions on the type of information that can be disclosed with respect to settlement of civil cases involving professional malpractice of physicians and surgeons and doctors of podiatric and osteopathic medicine. The Medical Board is required by SB 1950 to develop "high or low risk" categories for these

professionals depending on the nature of their practice. The number of settlements which can be reported for a given time period is then made dependant on the risk category assigned. Certain types of settlements are excluded from these mandatory disclosure rules. Although the dollar amount of the settlement cannot be disclosed, SB 1950 mandates that these amounts be placed in three statistical categories based on the average number in the doctor's specialty. (I.e. Below or above average and average.) Further complicating the process is the rather lengthy mandatory disclaimer which must accompany such disclosures. Its general thrust is to suggest to the public that the existence of malpractice settlements should not by itself be interpreted to reflect adversely on the competence of the particular professional.

The Board has no discretion but to follow these statutory mandates. The Board does, however, have discretion on reporting information about malpractice settlements not covered by SB 1950. For example, settlements referred to in SB 1950 are those "entered into by the licensee on or after January 1, 2003." (B. & P. Code § 803.1(b)(2)(A).) The Board interprets this language to mean that the restrictions imposed by SB 1950 do not apply to any malpractice settlements entered into prior to this date.

For this reason, the Board has bifurcated its proposed regulation on disclosure of settlements depending on whether or not they were entered into before January 1, 2003. For those settlements entered into prior to this date, the Board proposes to make a straightforward disclosure including the amount of the settlement, the identity of the case, civil action and parties involved. In addition, the Board has developed a disclaimer utilizing a portion of the language found in SB 1950.

1399.706 - Disclosure of Information on Board's Website

This regulation would contain basic information describing the status and qualifications of each licensed doctor of podiatric medicine, including whether or not he or she is in "good standing."